

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20**

PACIFIC GAS AND ELECTRIC COMPANY

Employer

and

Case 20-RC-260942

**ENGINEERS AND SCIENTISTS OF CALIFORNIA,
LOCAL 20 INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL ENGINEERS
(IFPTE)**

Petitioner

DECISION AND DIRECTION OF ELECTION

Engineers and Scientists of California, Local 20 International Federation of Professional and Technical Engineers (Petitioner) seeks, by an *Armour-Globe* self-determination election, to add approximately 72 unrepresented employees employed by Pacific Gas and Electric Company (Employer) in its electric contract development and/or electric contract management department to its existing bargaining unit of technical and professional employees (existing unit). The employees in the petitioned-for voting group are employed in several classifications at various facilities throughout Northern and Central California. The Employer contends that the petitioned-for voting group is not appropriate because 26 employees included in the contract specialist classification (contract specialists) are managerial employees.

A hearing officer of the National Labor Relations Board (Board) held a hearing in this matter on June 9 and 10, 2020. Both parties made oral arguments at the conclusion of the hearing. Based on the record evidence and relevant Board cases, I find the petitioned-for voting group to be appropriate, and I am directing an election among that voting group.

THE EMPLOYER'S OPERATIONS

Background

The Employer is a gas and electric utility servicing customers in Northern and Central California. Petitioner represents approximately 3,900 of the Employer's technical and professional employees at multiple facilities throughout the State, and the parties have a longstanding collective-bargaining relationship.

The Employer's operation is divided into gas and electric functions. On the electric side, the Employer performs a multitude of functions related to its physical transmission network. These projects can be as complex as designing and building an entirely new facility or as simple as replacing a batch of electrical poles. Put simply, much of the work on

the electrical side involves delivering electrical power from its origin to customers. This requires maintenance of its physical infrastructure, such as poles and substations, but also maintenance of overhead circuitry, fuses and switches.¹

While the Employer has its own maintenance capability, it also hires outside contractors to perform construction and maintenance work. The record reflects that in 2019, by way of example, this contracted work had an estimated value of between \$500-600 million. The Employer's electric contract management department, which includes the subject employees, is involved in the process of engaging outside contractors to perform this work.

The Contract Development Process

Before any contracts are developed, the Employer begins with a resource plan. On a yearly basis, the Employer's asset management department develops a resource plan, which is essentially a list of work that must be completed on the electrical side in the following year. This resource plan is then provided to the Employer's resource management department to determine what work can be completed internally, and which items in the resource plan will require outside contracting. Once resource management determines the portion of the work to be contracted out, the contract development department is responsible for securing contractors.

The resource plan may be straightforward, such as replacing a certain number of electrical poles in a certain geographic area, or complex, such as designing and building an entire facility. When the resource plan calls for a complex project, one of the Employer's design engineers and/or estimators, classifications that are part of a different department, will complete the drawings and technical documents. The project is then handed over to contract development. At hearing, it was estimated that complex projects amounted to 10 percent of the work received by the contract development department.

The work of the contract development department consists of essentially four parts: development, vendor selection, award, and funding. The department supervisor begins the process by assigning a portion of the resource plan to a contract specialist. The contract specialist begins contract development by first determining the best pricing strategy to use, such as a lump sum or per unit price. The contract specialists then develop and/or collect the terms of the contract. The Employer maintains a bank of master service agreements that will cover many of a contract's details. For example, if the contract in question contains an hourly pricing model, the master service agreements establish the rates to be paid per classification per hour. The master service agreements also contain terms and conditions that are added to the contracts without modification.

¹ The record indicates that certain responsibilities related to the maintenance of this network were, until recently, divided between separate "electric transmission" and "electric distribution" departments, both of which employ the contract specialists at issue in this case. The difference between the two appear to be the portions of the network for which they are responsible. At the time of the hearing, it appears from the record these had been merged into a single "electric contract management" or "electric contract development" department. The Employer called the supervisor of the electric distribution side as a witness, and Petitioner called contract specialists on the electric transmission side as witnesses. I find the testimony of both to be relevant to the types of contracts that are developed, as described below.

The contract specialists then develop a scope-of-work document, containing a description of the job, the criteria that must be met, the terms and conditions under which the contract is performed, and the pricing structure. Some contracts are copies of prior contracts, and drafting the scope of work is straightforward. Other contracts are for new or unique projects or services, and drafting the scope of work may take significant research by the contract specialist. In developing the scope of work, the contract specialist uses the information provided in the resource plan, but they also draw from their knowledge of the construction industry and electrical networks to develop a contract with clear goals and requirements. In terms of value, individual contracts can vary from \$10,000 to \$50 million. At hearing, the supervisor of the contract specialists estimated the approximate median value of the ~200 contracts the department creates per year at \$1 million.

After development is complete, the project moves to the second step: selecting a contractor from the Employer's list of pre-approved vendors.² If a contract has a value of under \$1 million, the contract specialist posts the scope of work document and solicits bids from 3 to 6 vendors. If the contract has a value of over \$1 million, the contract specialist submits the scope of work document to a sourcing specialist, a classification employed in a different department, who solicits bids from vendors.³

When preparing bids, vendors often contact the Employer with questions. For contracts with a value under \$1 million, the contract specialist retains responsibility and is the point of contact. For contracts with a value over \$1 million, the contract specialist and sourcing specialist will share responsibility and work together. The Employer also assigns a project manager to the project, and this individual may be involved as well. During the bid process, a contract specialist might also accompany the vendor on a walk of the site in question, along with a sourcing specialist or project manager if those individuals are involved. After the vendors submit their bids, the contract specialist reviews the bid and might contact the vendor for clarifications.

The contract specialist typically awards the contract to the lowest bidder; an estimated 90% of the time. Examples of contracts being awarded to higher bidders include situations where a contract specialist determined the bid was artificially low because it omitted work that would likely need to be added later by change order, or where a project manager determined that details of the lowest bid were not feasible because of the terrain involved.

The final step involves funding the contract. The contract specialist creates a purchase requisition that identifies the cost of the contract, and that document is circulated among upper management for approval to commit funds. After the contract is awarded and funding has begun, the contract is forwarded to the departments involved in managing contracts.

² The Employer's database of pre-approved vendors includes hundreds of contractors. However, when limited to a certain type of project, the pool from which the contract specialist may select is significantly smaller.

³ The sourcing specialists are largely responsible for ensuring that the contract documents are complete and for referring documents for required legal and financial review. The sourcing specialist may also be in contact with the project manager or construction manager for review and consultation.

The contract specialists generally have a background in construction or electric utility maintenance and may have worked for the Employer in other departments. The contract specialist classification at issue in this case has five development steps, beginning at the entry level associate position and then followed by career, senior, expert, and principal, with each additional step indicating an increase in knowledge and experience. The salary range for the contract specialist classification is \$85,000-\$140,000 per year.

MANAGERIAL STATUS

The Board's Standard

Managerial employees are those employees in the highest levels of an employer's hierarchy, charged with taking or recommending discretionary actions that effectively control or implement their employer's policy. *NLRB v. Yeshiva University*, 444 US 672, 682 (1980). More specifically, Board law defines managerial employees as those employees that formulate, determine, and effectuate an employer's policies by expressing, and making operative, the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy. *The Republican Co.*, 361 NLRB 93, 95-96 (2014); *Bell Aerospace*, 219 NLRB 267, 288 (1975). Although not defined by statute, the Board excludes these employees from bargaining units because Congress regarded managerial employees "as so clearly outside the Act that no specific exclusionary provision was thought necessary." *Bell Aerospace* at 283.

To be considered managerial, employees must exercise discretion within, or independent of, their employer's policies, and as such considerable discretion does not render an employee managerial where their decision must conform to established policy. *Yeshiva University*, 444 US at 682-683. The party asserting managerial status bears the burden of proving that status. *The Republican Co.* at 96, citing *LeMoyne-Owen College*, 345 NLRB 1123, 1128 (2005).

When it is alleged that the employees in question are managerial because of their ability to commit the resources of the employer, the dollar amounts involved are relevant, but the amount of discretion involved is the determining factor. For example, in *Bell Aerospace*, the employees at issue received purchase requests, negotiated purchase contracts with outside vendors, and exercised discretion in determining the source and price of items, but they did not hold sufficient discretion to be considered managerial because items over \$5,000 required company authority and buyers were guided by numerous manuals and instructions. *Id.* at 385-386. In contrast, where an employee issued and executed purchase orders without any approval or review, the employer lacked any procurement policies to guide the employee, purchasing decisions were based on price, delivery, and quality, and the employee had the authority to initiate contacts with new suppliers, the Board found managerial authority. *Simplex Industries, Inc.*, 243 NLRB 111, 112-113 (1979).

The Contract Specialists are not Managerial Employees

Here, I find that the Employer has failed to carry its burden. The central tenet of the Board's standard is that the employee in question acts with such discretion and independence that they are effectively creating or operating without the guidance of policy. Here, the evidence demonstrates that contract specialists make decisions that can impact high-value contracts, but these decisions are made within an established, complex and multi-layered contracting system.

When a contract specialist begins the development process, significant decisions have already been made that shape and direct the contract. Asset management identifies the work in the resource plan and determines the time frame in which the work will be completed. Further, if the contract is for a complex project, the work is set forth in detail in the technical documents.

In the development of contracts, the contract specialists utilize an established set of materials, whether it be prior contracts or the master service agreements. The contract specialists make decisions at this step, a pricing model for example, but I do not find that this is the type of decision making that demonstrates policy setting or discretion outside of established policies. A set of possible pricing options exist, and the contract specialists use their skill and knowledge to select the one that seems best suited to the work in question. The contract specialists do not negotiate the pricing model with a vendor or determine the value of the contract. Rather, they are filling in the details to reach a goal determined elsewhere.

In selecting a vendor, the contract specialists select from a pre-approved list. Further, the nature of the work to be performed and the geographic area involved reduces the size of that predetermined pool. Nevertheless, the evidence demonstrates that the contract specialists use some discretion in selecting which vendors to solicit.

Turning to the third step of awarding the contract, I do not find that contract specialists exercise a significant amount of discretion, if any at all. Rather, the general policy and practice is to award to the lowest bidder. In those rare instances where the award goes to a higher bidder, the record reflects that it is sometimes due to anticipated change orders that would eventually add extra costs to that bid. Indeed, contract specialists use their skills and knowledge to determine the accuracy of bids to determine which bid is, in fact, the lowest bid and they award accordingly. Doing the math is a requirement of the job, not a function that the Board considers to be managerial. Similarly, as another example, contracts are not awarded to the lowest bidder if there is a flaw in the bid. In those instances, the project manager informs the contract specialist that the vendor's plan will not work. Again, the contract is then awarded to the vendor with the lowest *feasible* bid. Thus, these examples do not establish that the contract specialists use their discretion to develop or implement Employer policy. On the contrary, they are adhering to Employer policy.

At the fourth and final step in the process, the contract specialists submit a purchase requisition for approval from upper management. It is unclear from the record whether management has ever refused to fund a contract, but the fact that contract

specialists submit contracts for review and approval manifests an absence of managerial discretion. Of course, the above also assumes a contract where the contract specialist is working alone. When the contract specialist is working with a sourcing specialist or project manager, any independence and discretion are inevitably diminished.

The contract specialists here are like the buyers in *Bell Aerospace*. Their work is guided by manuals and policy, and does not involve the unfettered discretion present in *Simplex Industries*. Taken together, the record evidence shows that contract specialists do not determine the subject of the contracts they draft, or when and where the work will be performed. This is decided by others and included in the resource plan. To the extent their drafting and decisions impact who will do the work through vendor selection, they are operating within an established contracting system that limits their options for selecting vendors. The contracts that they create are then submitted for review and approval by management. The evidence does not show that contract specialists create or use discretion in implementing Employer policy. While the dollar value of the contracts to which they participate in committing the Employer are relatively high, their involvement in this process does not confer managerial status.⁴

CONCLUSIONS

I have considered the record evidence and the arguments of the parties, and I conclude that it is appropriate to hold a self-determination election among the employees in the petitioned-for voting group.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁵

⁴ Petitioner introduced evidence regarding the work that sourcing specialists perform in the existing unit and argued that the similarity between the sourcing and contract specialists' work demonstrates that contract specialists are not managerial employees. I do not rely on that evidence or the Decision and Direction of Election in Case 32-RC-223579 in finding the contract specialists at issue in this case to be employees within the meaning of Section 2(3) of the Act.

⁵ During the hearing the parties stipulated to the following commerce facts:

The Employer, Pacific Gas and Electric Company, a California corporation, with facilities located throughout Northern and Central California, is engaged in the business of providing gas and electric utilities to Northern and Central California. During the past twelve months, a representative period, the Employer received gross revenue in excess of \$250,000 and purchased and received materials or services valued in excess of \$5,000 directly from points located outside the State of California.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute an appropriate voting group for the purpose of a self-determination election:

All full-time and regular part-time employees employed by the Employer at all its locations in the following classifications: contract administrator, contract specialist, business performance analyst, electric construction specialist, and program manager, excluding all other employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **ENGINEERS & SCIENTISTS OF CALIFORNIA, LOCAL 20, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS (IFPTE)**.

A. Election Details

The election will be conducted by mail, per the parties' agreement. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 20, on July 2, 2020. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 20 office by close of business on July 23, 2020. In order to be valid and counted, the returned ballots must be received at the Region 20 office prior to the counting of the ballots.

All ballots will be commingled and counted at a location to be determined by the Regional Director on July 29, 2020.⁶

Any person who has not received a ballot by July 9, 2020, should immediately contact the Region 20 office at **(415) 356-5130**, or our national toll-free line at **1-866-667- NLRB (1-866-667-6572)**.

⁶ If, on the date of the count, the Region 20 office is closed, or if the Board agent conducting the count is working remotely due to COVID-19 concerns, the count will be conducted remotely. In that event, the parties will be provided information on how to participate in the count by videoconference.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the **payroll period ending immediately prior to the date of this Decision**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by June 30, 2020. The list must be accompanied by a certificate of service showing service on all parties. **The Region will not serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

We further request that one copy of the voter list be furnished in the form of mailing labels, if possible, for use by the Regional Office in mailing the voting kit to employees. While you are not required to comply with this request, your cooperation in doing so will assist in promptly sending mail ballots to each employee's correct address and maximize employee participation in the election. See *NLRB Casehandling Manual, Part 2 Representation Proceedings* Section 11312.1(h). The mailing labels should be created using the **Avery 5160 address labels** template in Word and sent to the Region in an electronic version for printing. The numbering of this list should be continuous for all employees in the voting unit, including challenged voters. The label should include the voter's unique number as set forth in the Voter List, their name, and their address. Each number is a unique identifier to the corresponding voter and for this reason, numbers should not be repeated.

See example:

1	John Doe	2	Jane Doe
	123 Test St		10 Main St
	San Francisco, CA 91234		Oakland, CA 98765

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to

12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

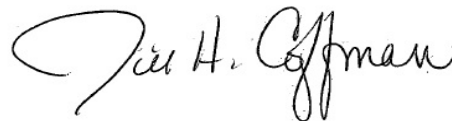
RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated at San Francisco, California this 26th day of June 2020.



Jill H. Coffman
Regional Director
NLRB, Region 20
901 Market Street, Suite 400
San Francisco, California 941